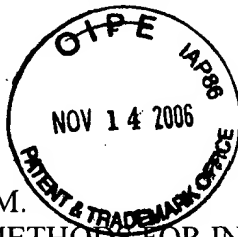


In The United States Patent And Trademark Office

Appl. No.: 09/909,587
Applicant(s): Richard O. Shuler
Filed: July 20, 2001
Art Unit: 3628
Examiner: Harbeck, Timothy M.
Title: SYSTEMS AND METHODS FOR INTERACTIVE BEEF
CATTLE MARKETPLACE



Confirmation No.: 2209

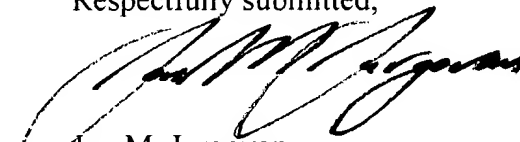
Docket No.: 043340/237124
Customer No.: 00826

Mail Stop Appeal Brief
Commissioner for Patents
Board of Patent Appeals and Interference
US Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

**APPEAL BRIEF TRANSMITTAL
(PATENT APPLICATION – 37 C.F.R. § 41.37)**

1. Transmitted herewith is the APPEAL BRIEF in this application, with respect to the Notice of Appeal filed on October 10, 2006.
2. ☒ Applicant claims small entity status.
3. Pursuant to 37 C.F.R. § 41.20(b)(2), the fee for filing the Appeal Brief is:
☒ small entity \$250.00
☐ other than small entity \$500.00
Appeal Brief fee due \$ 250.00
☒ Please charge the fee to Deposit Account 16-0605.
☒ Any additional fee or refund may be charged to Deposit Account 16-0605.

Respectfully submitted,


Jon M. Jurgovan
Registration No. 34,633

CUSTOMER NO. 00826
ALSTON & BIRD LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Tel Atlanta Office (404) 881-7000
Fax Atlanta Office (404) 881-7777

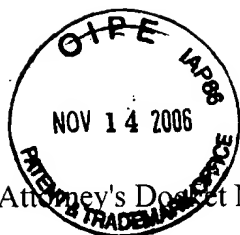
In re: Richard O. Shuler
Appl No.: 09/909,587
Filing Date: July 20, 2001
Page 2

"Express Mail" mailing label number EV 813816602 US
Date of Deposit November 14, 2006

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to: Mail Stop Appeal Brief-Patent, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450



Shelley Victoria



Attorney's Docket No. 043340/237124

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No.: 09/909,587 Confirmation No.: 2209
Applicant(s): Richard O. Shuler
Filed: July 20, 2001
Art Unit: 3628
Examiner: Harbeck, Timothy M.
Title: SYSTEMS AND METHODS FOR INTERACTIVE BEEF
CATTLE MARKETPLACE

Docket No.: 043340/237124
Customer No.: 00826

Mail Stop Appeal Brief-Patents
Commissioner for Patents
Board of Patent Appeals and Interference
US Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF UNDER 37 CFR § 41.37

This Appeal Brief is filed pursuant to the "Notice of Appeal to the Board of Patent Appeals and Interferences" filed October 10, 2006.

1. *Real Party in Interest.*

The real party in interest in this appeal is AgSpan, L.L.C., a Delaware limited liability company, the assignee of the above-referenced patent application.

2. *Related Appeals and Interferences.*

There are no related appeals and/or interferences involving this application or its subject matter. Nor is there any related litigation involving this application.

09/15/2006 MBIZUNES 00000105 160605 09909507
02 FC:2402 250.00 DA

3. *Status of Claims.*

Claims 1-11 are pending in the application. All of Claims 1-11 were rejected in the final Office Action dated July 11, 2006.

4. *Status of Amendments.*

No amendments have been filed after the final Office action dated July 11, 2006.

5. *Summary of Claimed Subject Matter.*

Claim 1 is directed to a method implemented in a beef cattle marketplace comprising a buyer interface 10, a producer interface 14, and a cattle information server 16 (FIG.1; P3:L3-7; P4:L29-P8:L32). The cattle information server 16 receives information defining demand profiles specifying a first pre-conditioning program for a group of cattle from the buyer interface 10 (FIG.1; P3:L7-9) and information defining a supply profile specifying a second pre-conditioning program for the group of cattle from the producer interface 14 (FIG.1; P3:L9-12). The pre-conditioning programs can be any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter (P9:L31-P10:L1). The method compares the pre-conditioning programs of the supply and demand profiles to determine whether a match exists (FIG.1; P3:L12:16). In response to a match, the method generates an indication to the buyer interface or producer interface (FIG.1; P3:L12-16).

Claim 2 depends from Claim 1 and recites a step of generating a bid associated with at least one demand profile (P11:L1-2).

Claim 3 depends from Claim 1 and recites a step of generating a bid associated with at least one of the plurality of demand profiles comprises generating a bid price based at least in part on a non-fixed public index price. (P8:L3-5; P10:L26-P11:L19).

Claim 4 depends from Claim 1 and recites a step of receiving an acceptance of a bid from the producer interface. (FIG.4:P16:L29-P17:L2; Blocks 90, 100).

Claim 5 is directed to a system for dynamically marketing cattle comprising a buyer interface 10 (FIG.1;P3:L3-7;P4:L29-P8:L32), producer interface 14 (FIG.1;P3:L3-7), a network 12 (FIG.1;P3:L3-7), and a cattle information server 16 (FIG.1;P3:L5-7) communicatively connected to the buyer interface 10 and producer interface 14 through the network 12. The cattle information server 16 receives information from the buyer interface defining demand profiles (FIG.1: P3:L7-9). At least one of the demand profiles contains information specifying a first

pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter (P9:L31-P10:L1). The cattle information server 16 receives information from the producer interface defining a supply profile (FIG.1; P3:L9-12). The supply profile specifies a second pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter (P9:L31-P10:L1). The cattle information server 16 stores the demand profiles and supply profile in a database 28 (FIG. 1; FIG.2; P3: L9-12) and searches the database to determine if one or more of the demand profiles match the supply profile based at least in part on a comparison of the first and second pre-conditioning programs (P3: L12-16). The cattle information server 16 identifies to one of the buyer interface and producer interface at least one demand profile in response to a match between the supply profile and the demand profile (FIG. 1; P3:L12-16).

Claim 6 depends from Claim 5 and recites that cattle information server further generates a bid associated with at least one of the plurality of demand profiles. (P11:L1-2).

Claim 7 depends from Claim 6 and further recites that the bid generated by the cattle information server includes a bid price based at least in part on a non-fixed public index price (P8:L3-5; P10:L26-P11:L19).

Claim 8 depends from Claim 6 and recites that the cattle information server further accepts a bid using the producer interface. (FIG.4:P16:L29-P17:L2; Blocks 90, 100).

Claim 9 is directed to a method for tracking cattle production in a beef cattle marketplace comprising a cattle information server 16 and at least one interface 10, 14, each of which is communicatively connected to a network 12 (FIG. 1: P3:L22-24). The method comprises receiving information defining a supply profile at the cattle information server 16 from the interface 10, 14. The supply profile specifies a pre-conditioning program of an identified group of cattle comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter (P9:L31-P10:L1). The method further comprises steps of verifying, by a third party, the pre-conditioning program of the identified group of cattle (P3:L26-29). The method further comprises storing the supply profile of the identified group of cattle in a database associated with the cattle information server (P3:L26-29).

The method also comprises receiving information defining carcass characteristics of the identified group of cattle at the time of harvest from the interface (P3:L29-31); storing the carcass characteristics of the identified group of cattle in a database associated with the cattle information server (P3:L31-32); and correlates the carcass characteristics of the identified group of cattle with the supply profile (P3:L32-P4:L1).

Claim 10 depends from Claim 9 and further recites a step of identifying one of a geographic location and ownership identification of at least one animal selected from the identified group of animals (P4:L1-4; P8:L27-30; P10:L22-25).

Claim 11 depends from Claim 9 and further recites a step of storing a plurality of supply profiles and correlated carcass characteristics in a database and mining the database to determine patterns between the pre-conditioning program and at least one carcass characteristic (P3:L29-P4:L1; P9:L19-23; P10:L16-25; P19:L29-30).

6. *Grounds of Rejection to be Reviewed on Appeal.*

I. Whether Claims 1-11 are Definite under 35 U.S.C. 112, Second Paragraph?

II. Whether Claims 1-8 are Nonobvious under 35 U.S.C. 103(a) over the combination of *Bi* (US 6311178 B1), *Ordish* (US 2001/0039527 A1) and *Gransbery* ("Bull breeders keep track of the consumer," The Billings Gazette, Billings, Mont: Oct. 17, 1995 Sec. A pg. 7)?

III. Whether Claims 9-11 are nonobvious under 35 U.S.C. 103(a) over the Combination of *Bi*, *Ordish*, *Gransbery*, *Pratt* (US 5673647) and Alleged Prior Art?

7. *Argument.*

I. Claims 1-11 are Definite under 35 U.S.C. 112, Second Paragraph

A. The Rejection of Claims 1-11 under 35 U.S.C. 112, Second Paragraph

On Page 2 of the Office action, the Examiner rejects Claims 1-11 under 35 U.S.C. 112, Second Paragraph, alleging that the phrase “the pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management and health of cattle prior to slaughter” is indefinite. In particular, the Examiner argues that the word “numerous” is indefinite.

**B. Legal Precedent Interpreting Definiteness Requirement under 35 U.S.C. 112,
Second Paragraph**

If one skilled in the art would understand the bounds of the claim when read in light of the specification, then the claim satisfies section 112 paragraph 2. *Exxon Research & Eng'g, Co. v. U.S.*, 265 F.3d 1371, 60 USPQ2d 1272 (Fed. Cir. 2001)(citing *Miles Labs., Inc. v. Shandon, Inc.*, 997 F.2d 870, 875, 27 USPQ2d 1123, 1126 (Fed. Cir. 1993). “The primary purpose of the definiteness requirement is to ensure that the claims are written in such a way that they give notice to the public of the extent of the legal protection afforded by the patent, so that interested members of the public, e.g., competitors of the patent owner, can determine whether or not they infringe. *All Dental Prodx, LLC v. Advantage Dental Products, Inc.*, 309 F.3d 774, 64 USPQ2d 1945 (Fed. Cir. 2002)(citing *Warner-Jenkinson*, 520 U.S. at 28-29). “Only when a claim remains insolubly ambiguous without a discernible meaning after all reasonable attempts at construction must a court declare it indefinite.” *Exxon Research & Eng'g Co. v. U.S.*, 265 F.3d 1371, 1375, 60 USPQ2d 1272 (Fed. Cir. 2001).

C. Claims 1-11 are Definite under 35 U.S.C. 112, Second Paragraph

In the present case, Claim 1 is not indefinite because it provides adequate notice that anyone using a pre-conditioning program with a protocol or criterion that governs the breeding, feeding, management and health of cattle prior to slaughter may be infringing the claim if the other claim elements are present in an accused method. It should be noted that if Applicant were to provide the definite article “the” before “numerous”, then the Examiner may find an antecedent basis problem. To avoid this, Applicant recited the limitations without the definite article “the” before “numerous.” The Manual of Patent Examining Procedure (MPEP) states: the failure to provide explicit antecedent basis for terms does not always render a claim indefinite. If

the scope of a claim would be reasonably ascertainable by those skilled in the art, then the claim is not indefinite. MPEP §2173.05(e).

The reference to “numerous” protocols or criteria is not indefinite since one of ordinary skill in this art would have known that there are in fact numerous protocols and criteria governing the breeding, feeding, management and health of cattle prior to slaughter. In addition, it is reasonable to assume that more protocols and criteria will be developed in the future during the term of enforceability of any patent issuing on this application. Therefore, the word “numerous” is not indefinite in the context presented, and those of ordinary skill in the art are able to understand the limitations of Claim 1. Similar logic applies to remaining Claims 2-11.

D. Alternate Solution to Definiteness Issue

In the alternative, Applicant has no objection if the Board of Patent Appeals and Interferences (BPAI) elects under its authority provided by 37 C.F.R. §41.50(c) to propose a claim amendment to include the word “the” before “numerous” or to state “the pre-conditioning program comprising a protocol or criterion that governs the breeding, feeding, management and health of cattle prior to slaughter.”

II. Whether Claims 1-8 are Nonobvious under 35 U.S.C. 103(a) over the Combination of *Bi* (US 6311178 B1), *Ordish* (US 2001/0039527 A1) and *Gransbery* (“Bull breeders keep track of the consumer,” *The Billings Gazette*, Billings, Mont: Oct. 17, 1995 Sec. A pg. 7)

A. The Rejection of Claims 1-8 under 35 U.S.C. 103(a) based on the Combination of *Bi*, *Ordish* and *Gransbery*

On pages 2-5 of the Office Action, Claims 1-8 were rejected under 35 U.S.C. 103(a) as being unpatentable over *Bi*, *Ordish* and *Gransbery*. Applicable legal precedent, the citations relied upon in the rejection, and the analysis of errors in the Office Action warranting reversal, are provided below.

B. Applicable Law, Rules and Procedure Governing Obviousness Determination under 35 U.S.C. 103(a)

The Examiner has the burden of establishing a prima facie case of obviousness under 35 U.S.C. §103(a). *Ex Parte Martin P. Hageman and Thomas J. Palus*, Appeal No. 2000-1514,

Application No. 09/038,450 (citing *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q.2d 1955, 1956 (Fed. Cir. 1993)); *In re Oetiker*, 977 F.2d 1443, 1445, 24 U.S.P.Q.2d 1443, 1444 (Fed. Cir. 1992); *In re Piasecki*, 745 F.2d 1468, 1472, 223 U.S.P.Q. 785, 788 (Fed. Cir. 1984). Only if the Examiner satisfies this initial burden does the burden of coming forward with evidence shift to the Applicant. *Id.* To satisfy this burden, the Examiner must show (1) some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings; (2) a reasonable expectation of success; and (3) the prior art reference, or references when combined, must teach or suggest all the claim limitations. M.P.E.P. §2143, 8th Ed., 4th Rev. The Examiner can satisfy this burden only by showing some objective teaching in the prior art or knowledge generally available to one of ordinary skill in the art suggests the claimed subject matter. As to motivation, use of hindsight, in effect using the Applicant's disclosure against the Applicant, is not permitted. *In re Dow Chem. Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1531 (Fed.Cir. 1988); *In re Rouffet*, 149 F.3d 1350, 1358, 47 U.S.P.Q.2d 1453, 1458 (Fed. Cir. 1988); *Pro-Mold and Tool Co. v. Great Lakes Plastics Inc.*, 75 F.3d 1568, 1573, 37 U.S.P.Q.2d 1626, 1629-30 (Fed. Cir. 1996); *In re Laskowski*, 871 F.2d 115, 10 U.S.P.Q.2d 1397 (Fed. Cir. 1989); *In re Fine*, 87 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1598 (Fed. Cir. 1988). Furthermore, the teaching, suggestion, or motivation to modify or combine features in an effort to obtain the claimed invention must be "clear and particular." *In re Dembiczak*, 175 F.3d 994, 999 (Fed. Cir. 1999). "The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification." *Ex Parte Patrizia Milazzo et als.*, 2002 WL 1821709 (Bd.Pat. App. & Interf.)(citing *In re Fritch*, 972 F.2d 1260, 1266 n.14, 23 U.S.P.Q.2d 1780, 1783-84 n.14 (Fed. Cir. 1992), *In re Gordon*, 733 F.2d 900, 902, 221 U.S.P.Q.2d 1125, 1127 (Fed. Cir. 1984). 12783-4 n. Both the references and the claimed invention must be considered as a whole rather than piecemeal. *In re Antonie*, 559 F.2d 618, 620 (CCPA 1977); *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984); *In re Gulack*, 703 F.2d 1381 (Fed. Cir. 1983).

Even assuming the Examiner has established a *prima facie* case of obviousness, the Examiner must further consider any evidence supporting patentability of the claimed invention. *In re Oetiker*, 977 F.2d 1443 (Fed. Cir. 1992). The determination of whether an invention is or is not obvious is a legal conclusion based on underlying factual inquiries including: (1) the scope and content of the prior art; (2) the differences between the prior art and the claimed invention; (3) the level of ordinary skill in the art; and (4) objective evidence of nonobviousness. *In re Dembiczak*, 175 F.2d 994, 998 (Fed. Cir. 1999) (citing *Graham v. John Deere, Inc.*, 383 U.S. 1, 17-18, 86 S.Ct. 684, 15 L.Ed.2d 545, 148 USPQ 459, 465 (1966)).

As will be discussed below, Applicant respectfully submits that Examiner has not met the burden of establishing the *prima facie* case of obviousness under 103(a). Applicant further respectfully submits that even if Examiner had met the burden of establishing the *prima facie* case of obviousness, Examiner has not met the burden of establishing the factors outlined in *John Deere*.

C. *Bi* (US 6311178 B1)

Bi discloses a computer matching system comprising a database, an offer creation program for creating an offer entity in the database, and a search engine for comparing search criteria or requirement input by a user with the offers existing in the database. C3:L45-60. When a requirement is received by a user, the search engine is executed to match the requirement with existing offers. The matching results may be ranked by confidence, i.e., a matching level or search score, and the matching results are returned to the user. Each search criteria or requirement may include multi-elements such as product, market position (buyer, seller, both), date of offer, date of delivery, offerer, price and volume. C4:L51-54.

D. *Ordish* (US 2001/0039527)

Ordish discloses a matching system for trading instrument which may be foreign exchange, stocks, bonds, or commodities future contracts which are automatically matched against offers. P9:L1-15. The matching system also provides automated confirmation of a trade. P9:L4-11. The system comprises a host computer or central station for matching like bids and

offers provided in accordance with predetermined matching criteria, a transaction originating keystation or client for providing a bid on a given trading instrument to the system for providing a potential matching transaction, and a counterparty keystation in the system for enabling data communications therebetween. P9:L11-22. The host computer comprises means for providing a match notification data message to the transaction originating keystation and the counter party keystation via the network in response to the occurrence of a matching transaction at the host computer. P9:L22-30. The match notification data message indicates that a match has occurred but that the deal has not been confirmed or completed since all counter parties to the deal have not yet been notified. P9:L31-35. Means for match acknowledgement are located at each of the keystations for providing a match acknowledgement data message to the host computer via the network in response to receipt of the match notification data message by the transaction originating keystation means and the counterparty keystation so that confirmation of the trade and ultimate ticket generation can occur. P9:L35-43. The host computer further comprises means for providing a confirmed trade data message to the transaction originating keystation and the counterparty keystation. P9:L43-49. Each keystation also includes trade status timing means for timing receipt of the confirmed trade data message by respective keystation based on the timed receipt of the confirmed trade data message. P9:L59-64. An alarm is displayed at the keystations if a confirmed trade message is not received within a time interval determined by the trade status timing means. P9:L64-71.

A client generates an offer message 1 with the quantity and price of a trading instrument to be sold to a central system known as a host computer 200. P14:L1-3. The offer is then anonymously broadcast as message 2 to all clients or keystations, including client A that made the offer and client B from whom a trade is solicited. P14:L4-7. The client B can make a counter offer for a lesser amount and transmits a message 3 reflecting the same to the host computer 200 which in turn sends a message 4 to client A to confirm sale of the lesser amount at the offer price. P14:L9-16.

E. The *Gransbery* Article (“Bull breeders keep track of the consumer” Jim Gransbery, *The Billings Gazette*, Billings, Montana, Oct. 17, 1995, Sec. A, p. 7)

Gransbery is an article based on the comments of several interviewees addressing the question “How does one sell bulls in a bear cattle market?” The article notes that as of its date, fed cattle and calf prices had been trending lower with predictions for depressed marketing. The article suggests that the solution is to convince customers to invest in high-performance breeding stock. In some cases this means defining who the specific consumer really is. One interviewee states “Produce the cattle that is trending toward what the consumer and the packer is demanding. A terminal cross with Piedmontese produces a superior product of palatability and more red meat. We have had no problems marketing seed stock, and in 1994 and 1995, value-based marketing of branded beef” has been successful. Another producer states “You’d better have good bulls. Quality speaks for itself. The best investment brings the best product.” Another interviewee states the goal is to “give a competitive edge to the buyer, to make money for the cow/calf producer.” Another interviewee states “The downward pressure in this market on the commercial producer is to keep some bulls a little longer. So you have to have a product to sell.” Yet another states “If it is for the commercial, it has to fit the environment and the management plans. If it is for the breeder, it first must be an outstanding animal. Plus there must be performance.” Another interviewee states his breed preference is one that “thrives in a down market. This is a low-input-cost cow that is self-reliant.”

F. Piecemeal Examination is Impermissible under 35 U.S.C. 103(a)

As noted above, in making the obviousness determination under 35 U.S.C. 103(a), both the claimed invention and prior art must be viewed as a whole. The Office Action, Page 3, Paragraph 1, provides unequivocal evidence that the Examiner has engaged in piecemeal examination in this case. Specifically, the Examiner has extracted certain limitations from the Claim and has asserted that each is disclosed in one of the citations *Bi*. For example, the first step of Claim 1 is NOT “receiving information defining a plurality of demand profiles a [sic] the information server from the buyer interface, wherein at least one of the demand profiles specifies a first pre condition” as stated in the Office action. The first step of Claim 1 is instead

“receiving information defining a plurality of demand profiles at the cattle information server from the buyer interface, wherein at least one of the demand profiles specifies a first pre-conditioning program for a group of cattle, a pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter.” The Examiner has extracted pieces of the Claim and has asserted that each piece is disclosed in the prior art. This is an erroneous approach to obviousness contrary to the “as a whole” requirement of 35 U.S.C. 103(a) that has been repeatedly rejected by the BPAI and reviewing Courts. *In re Antonie*, 559 F.2d 618, 620 (CCPA 1977); *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984); *In re Gulack*, 703 F.2d 1381 (Fed. Cir. 1983). *See also Diamond v. Diehr*, 450 U.S. 175, 176 (1981) (noting that claims must be considered as a whole, it being inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis); *Princeton Biochemicals, Inc., Beckman Coulter, Inc.*, 411 F.3d 1332, 1337 (Fed. Cir. 2005) (holding that section 103 specifically requires consideration of the claimed invention as a whole; without this important requirement, an obviousness assessment might successfully break an invention into its component parts and then find a prior art reference corresponding to each component); *Ex Parte Takeshi Yamamori*, 2002 WL 230623, 2 (Bd.Pat.App. & Interf.) (noting that the examiner cannot dissect the claim limitations; rather, they must be considered as a whole).

The rejection of Claims 2-4, which depend from Claim 1, necessarily incorporate this defect. Reversal of the Examiner’s rejection is requested for this additional reason.

The rejection of Claim 5 on Page 5 of the Office action was rejected on the same rationale as Claim 1, which means that improper piecemeal examination has been employed for Claims 5-8. Accordingly, reversal of the Examiner’s rejection is requested for these Claims as well.

G. Lack of Motivation to Combine *Bi*, *Ordish* and *Gransbery*

Applicant respectfully submits there was no suggestion or motivation to combine *Bi*, *Ordish* or *Gransbery* as done in the Office Action. The Examiner asserts: “It would have been obvious to anyone skilled in the ordinary art at the time of invention to include the teachings of

Ordish to the disclosure of *Bi*, because commodities such as cattle were popular trading instruments and would have been simple to include in any matching or trading system.” Office Action, Page 3, Para. 3 through Page 4, Para. 1. This is the sole reason given by the Examiner as motivation for combining *Bi* and *Ordish*. However, the concept of commodities trading in which fungible goods are traded on a large scale without information as to their origin or how they were produced is actually contrary to the approach taken in the claimed invention in which the buyer can specify a group of cattle by “a pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter.” In *Bi* communication of an offer includes product, market position (buyer, seller, both), date of offer, date of delivery, offerer, price and volume, but no background information on the product. C4:L51-54. Similarly, in *Ordish*, an offer message is limited to the quantity and price of a trading instrument to be sold. P14:L1-3. Thus, properly understood, *Bi* and *Ordish* not only provided no motivation to combine, but they “teach away” from the claimed invention.

Further evidence of the fungible commodities focus of *Ordish* is provided by the fact *Ordish* specifically teaches a system which receives an offer to sell which is transmitted as message 1 to a central system and is thereafter anonymously *broadcast* as a message 2 to *all clients or keystations*. (*Ordish*, page 3, para. [0014]). Thus, *Ordish* uses an indiscriminate broadcast which is not targeted to specific buyers or producers, certainly not on the basis of a particular pre-conditioning program for cattle. The claimed invention works differently as made clear by the final step of Claim 1: “providing an indication to one of the buyer interface and the producer interface of at least one matching demand profile in response to a match.” In Claim 1 the cattle information server receives demand and supply profiles including pre-conditioning programs, and notifies one of the buyer and producer if there is a match. This approach is wholly at odds with the broadcast approach of *Ordish* which is not based on any match between cattle pre-conditioning programs of demand and supply profiles. Thus, a person of ordinary skill in the art would not have been motivated to combine it with *Bi*, *Ordish* or *Granbery* in an effort to obtain the claimed invention.

The Office action alleges: “*Gransbery* discloses that breeders of cattle are becoming more aware of consumer demands for the product and have started to breed cattle with this

demand in mind. Therefore it would have been obvious to anyone skilled in the ordinary art at the time of the invention to include the teachings of *Gransbery* to the disclosure of *Bi* in view of *Ordish* so that the producers can inform potential buyers of the cattle of the specific breeding practices in order to increase the appeal to the overall market. In producing the type of cattle that the market is demanding (and being sure to announce this fact), the breeders are more likely to achieve a higher return on their investment.” *Gransbery* is actually an article reporting on approaches used by various cattle producers to sell bulls in a depressed cattle market. The various producers interviewed offer various responses as to how this can be done: “produce the cattle that is trending toward what the consumer and the packer is demanding” – “You’d better have good bulls” – “Quality speaks for itself” – “You have to have a product to sell” – “If it is for the commercial, it has to fit the environment and the management plans” – “If it is for the breeder, it must first be an outstanding animal. Plus there must be performance” – use a breed that “thrives in a down market” – use a “low-input-cost cow that is self-reliant.” Thus, properly viewed as a whole, the person of ordinary skill in the art would not have been led to choose any particular approach to selling bulls in a depressed cattle market over the other choices. There is no mention of a demand profile or supply profile defined based on a “pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter” in *Gransbery* or *Bi* or *Ordish*. There is nothing in *Gransbery* that even hints at a technology implementation involving the claimed cattle information server, buyer interface and producer interface. Therefore, it is clear that the Examiner has engaged in hindsight reasoning in which the Applicant’s disclosure is the only possible source of motivation for combining the cited art. There is no motivation in the prior art to combine any of *Bi*, *Ordish*, or *Gransbery* as done in the Office action. The rejection should be reversed for this additional reason.

H. No Reasonable Expectation of Success in Making the Combination of *Bi*, *Ordish*, or *Gransbery*

Not only is there no reasonable expectation of success in attempting to combine *Bi*, *Ordish*, or *Gransbery*, there is the opposite – a certainty of failure - if one were to attempt to make the combination. As mentioned above, both *Bi* and *Ordish* use offers which are limited to

very basic information about the product or commodities trading instrument. Furthermore, *Ordish's* indiscriminate broadcast technique for trading a fungible commodity is very different from the claimed invention which is a targeted approach to notifying one of a buyer or producer of the existence of a matching demand or supply profile which provides more information on the cattle background, i.e., the pre-conditioning program. *Bi* and *Ordish* are directed to trading products or trading instruments with offers of very limited terms – price and quantity and in the case of *Bi* a few other pieces of information – but not a definition of a cattle pre-conditioning program as recited in the claimed invention. Thus, *Bi* and *Ordish* represent the approach of providing greater liquidity in a market by treating commodities the same way regardless of their background. In contrast, the approach taken in the claimed invention using a demand or supply profile to define, with no capability to identify commodities by the background and other information a purchaser may consider relevant in buying a product. One of ordinary skill in the art could have had no reasonable expectation of success in obtaining the claimed invention but instead would be bound to failure by limiting the amount of information to be included in an offer as done in *Bi* and *Ordish*.

Furthermore, one of ordinary skill in the art could have had no reasonable expectation of success in combining *Gransbery* with *Bi* and *Ordish* since *Gransbery* is simply a statement of different opinions as to how one can sell bulls in a down market. *Gransbery* mentions nothing about technology such as a cattle information server, buyer interface or producer interface or how they can be used to receive and compare demand and supply profiles based on a cattle pre-conditioning program to determine if there is a match, and if so notifying either the buyer or producer. Therefore, a person of ordinary skill in the art would have been at a complete loss to comprehend how the *Gransbery* article could in any way be relevant to the *Bi* or *Ordish* disclosures. Thus, one of ordinary skill in the art could have had no reasonable expectation of success in combining the *Bi*, *Ordish* and *Gransbery* disclosures in any way. Reversal of the rejection is requested for this reason.

I. No Determination of the Level of Ordinary Skill in the Art has been made in the Rejection

As noted above, the U.S. Supreme Court has found that examiner must resolve the level of ordinary skill in the art in making a determination of obviousness. *Graham v. John Deere, Inc.*, 383 U.S. 1, 17-18, 86 S.Ct. 684, 15 L.Ed.2d 545, 148 USPQ 459, 465 (1966). In this case, the Examiner has failed to determine the level of ordinary skill in the art in making the obviousness rejection. Therefore, the rejection must be reversed for this additional reason.

J. The Combination of *Ordish*, *Bi* and *Gransbery* Fails to Disclose All of the Limitations of Claims 1-8

Claim 1 is set forth below:

1. (currently amended) In a beef cattle marketplace comprising a buyer interface, a producer interface, and a cattle information server, each of which is communicatively connected to a network, a method for marketing cattle comprising:

receiving information defining a plurality of demand profiles at the cattle information server from the buyer interface, wherein at least one of the demand profiles specifies a first pre-conditioning program for a group of cattle, a pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter;

receiving information defining a supply profile for a group of cattle at the cattle information server from the producer interface, wherein the supply profile specifies a second pre-conditioning program for the group of cattle;

comparing the supply profile to the plurality of demand profiles to determine whether a match exists between the supply profile and one of the demand profiles, based at least in part on a comparison of the first and second pre-conditioning programs; and

providing an indication to one of the buyer interface and the producer interface of at least one matching demand profile in response to a match.

Bi, *Ordish* and *Gransbery*, whether considered alone or in combination, do not teach all of the claim limitations of Claim 1. Specifically, *Bi*, *Ordish* and *Gransbery* do not teach “**receiving information defining a plurality of demand profiles at the cattle information server from the buyer interface, wherein at least one of the demand profiles specifies a first pre-**

conditioning program for a group of cattle, a pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter,” as required by Claim 1, for example. As discussed above, the claimed invention must be considered as a whole, prior to a determination of obviousness. Applicant respectfully submits that the method, as claimed in Claim 1, is not just a method applicable to buying and selling commodities, as suggested by the Examiner, but is intrinsically specialized and configured for the buying and selling of cattle, based at least in part on the requirement of a pre-conditioning program being included in demand profile of Claim 1, and that pre-conditioning program is recited to comprise any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter. *Bi* and *Ordish* communicate offers using such limited information they would be insufficient to identify or describe a cattle pre-conditioning program. Thus, *Bi*, *Ordish* and *Gransbery*, whether considered alone or in combination, fail to disclose the claimed invention. Necessarily, the combination of *Bi*, *Ordish* and *Gransbery* does not disclose the remaining steps of Claim 1 which are necessarily related to the first receiving step of Claim 1.

Claims 2-4 depend from Claim 1, and thus include all limitations of Claim 1. Thus, Claims 2-4 distinguish over the prior art for the reasons previously stated with respect to Claim 1. In addition, the Examiner specifically notes with respect to Claim 3 that “the references do not explicitly disclose the step of generating a bid associated with at least one of the plurality of demand profiles” which comprises “generating a bid price based at least in part on a non-fixed public index price”. Applicant respectfully submits that Examiner has failed to put forth objective teachings which would somehow make these references combinable to teach the limitations of Claim 3, when the references themselves *do not disclose* the limitations of Claim 3. Applicant respectfully submits that Examiner likewise stated that the references “do not explicitly disclose the step of receiving an acceptance of a bid from the producer interface” as required by Applicant’s Claim 4, and has failed to put forth objective teachings which would make these references combinable to teach the limitations of Claim 4, when the references themselves *do not disclose* the limitations of Claim 4.

Claim 5 is recited as follows:

5. (currently amended) A system for dynamically marketing cattle comprising:
a buyer interface;
a producer interface;
a network; and
a cattle information server wherein the cattle information server is communicatively connected to the buyer interface and the producer interface through the network;
wherein the cattle information server: receives information from the buyer interface defining a plurality of demand profiles, wherein at least one of the demand profiles contains information specifying a first pre-conditioning program, **the first pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter**; receives information from the producer interface defining a supply profile, wherein the supply profile specifies a second pre-conditioning program, **the second pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter**; stores the demand profiles and supply profile in a database; and searches the database to determine if one or more of the demand profiles match the supply profile based at least in part on a comparison of the first and second pre-conditioning programs; and identifies to one of the buyer interface and producer interface at least one demand profile in response to a match between the supply profile and the demand profile.

The Examiner did not provide a separate and clear rejection of Claim 5, but rather stated that the system claims of Claims 5-8 “would have been obvious from previously rejected method claims 1-4 respectively, and are therefore rejected using the same art and rationale.” Thus, Applicant respectfully submits that Examiner has not met the burden of showing a *prima facie* case of obviousness, by failing to show how the references, when combined, teach or suggest all of the limitations of Claims 5-8. Moreover, based on Examiner’s language in rejecting Claim 1, Applicant submits that the combination of *Bi*, *Ordish*, and *Granbery* does not teach all of the limitations of Claim 5. Specifically, the combination of *Bi*, *Ordish*, and *Gransbery* does not teach a cattle information server which receives information from a buyer interface defining a plurality of demand profiles, wherein at least one of the demand profiles contains information specifying a first pre-conditioning program, a pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of

cattle prior to slaughter, as required by Claim 5. As discussed above, the claimed invention must be considered as a whole, prior to a determination of obviousness. Applicant respectfully submits that the system for dynamically marketing cattle, as claimed in Claim 5, is not just a system applicable to buying and selling commodities, as suggested by the Examiner, but is intrinsically specialized to the buying and selling of cattle, based at least in part on the requirement of a pre-conditioning program being included in both the demand and supply profiles of Claim 5. This is not disclosed or suggested in the combination made by the Examiner.

As discussed above with respect to Claim 1, Applicant respectfully submits that *Bi, Ordish* and *Granbery* are not properly combinable when taken as a whole, in order to make a proper rejection of Claim 5.

Claims 6-8 depend from Claim 5, and thus include all limitations of Claim 5. Thus, Claims 6-8 distinguish over the prior art for the reasons previously stated with respect to Claim 5. Additionally, Examiner has not provided separate rejections for Claims 6-8 to which Applicant can respond.

In conclusion, because the Examiner has not met the burden of establishing the *prima facie* case of obviousness under § 103(a), Applicant respectfully requests that the rejection of Claims 1-8 be reversed with instructions to withdraw the rejection and issue a Notice of Allowance for all pending Claims.

III. Claims 9-11 are Nonobvious under 35 U.S.C. 103(a) over the Combination of *Bi*, *Ordish*, *Gransbery*, *Pratt* (US 5673647) and Defective “Well-Known” Art

On Page 5 of the Office Action, Claims 9-11 were rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of *Bi*, *Ordish*, *Gransbery* and *Pratt*. The disclosures of *Bi*, *Ordish*, and *Gransbery* were addressed above with respect to the rejection of Claims 1-8. The *Pratt* disclosure and the reasons that Claims 9-11 are patentable over the prior art of record are addressed separately below.

A. *Pratt*

Pratt discloses a system and method which have as one objective to enable the accurate and efficient accumulation, recording and correlation of historical data, feedlot performance data, and carcass data for each animal, and the transmission of such data (a) to the producer for use in the genetic selection and breeding of future animals for beef productions, and (b) to the feedlot for improving the accuracy of performance, feed and marketing projections for future animals of similar characteristics in the feedlot. C5:L46-54. When an animal is shipped to the packing plant, its electronic ear tag goes with it so that the animal's carcass data recorded at the packing plant can be correlated to the live animal and to its feedlot and historical data. The carcass data for each animal, including grading, cost and market value data, can then be transmitted to the feed lot, and to the producer for use by each, the producer in making breeding, selection or purchase decisions, and the feedlot in making management decisions and in allocating costs to the owner on an individual animal basis. C7:L54-55. A host computer 78 receives individual and group inputs reflecting the animal's birth date and genetic background, weight, hip height, backfat and hide condition. Group information includes average daily weight gain in the pasture and group condition score, sex, age, breed and hide thickness breakdown for animal's in the group. Environmental factors such as air temperature, wind and pen conditions where the animals came from may also be entered in the host computer system. Management factors for each group including implants, ionophores and processing information, are collected and input in the computer. Market factors such as purchase price, cattle futures, basis and premium discounts for the animals in the group are also input to the computer. The computer then calculates

expected date to finish, optimum end weight, and projected end points such as finish weight, hot carcass weight, yield grade, and USDA quality grade. The computer also calculates return on investment including cost, incomes and profit. C28:L59-C29:L43. *Pratt* contains no mention of any network: its feedlot business system (FBS) computer is instead connected directly to various sensor interfaces (see, e.g., FIG. 5).

B. Piecemeal Examination is Impermissible under 35 U.S.C. 103(a)

As noted above, an Examiner is not permitted to dissect a Claim into separate parts and apply a citation to each part in making an obviousness determination under 35 U.S.C. 103(a). Instead, both the claimed invention and the prior art must be viewed as a whole. Reviewing the analysis of the rejection on Pages 5-8 of the Office Action, one is led to the inescapable conclusion that the Examiner has used a piecemeal approach to examination in this case. More specifically, the Examiner asserts *Bi* discloses the first two “receiving” and “storing” steps of Claim 9, and that *Pratt* discloses the remaining steps except the “verifying” step which the Examiner now asserts is well known. It is clear that the Examiner is dissecting the steps of Claim 9 and attempting to apply a citation to the dissected part, and is not considering both Claim 9 and the citations as a whole. Furthermore, on Page 7, the Examiner states that it was well known at the time of the invention to utilize the services of a third party in order to verify aspects of a product or service. However, this is not at all what is claimed in the “verifying” step. The Examiner is again extracting elements of the claim, abstracting them out of context, and asserting obviousness using this piecemeal approach. Reversal of the rejection of Claims 9-11 under 35 U.S.C. 103(a) is requested for these reasons.

C. Lack of Motivation to Combine *Bi*, *Ordish*, *Gransbery*, *Pratt* and Alleged Well-Known Art

As noted above with respect to Claim 1, there was no motivation that would have led the person of ordinary skill in the art to combine *Bi*, *Ordish* and *Granbery* as done in the Office Action. There is even less motivation in obtaining the claimed invention when one adds *Pratt* and the alleged well-known art to the mix. *Pratt*’s host computer system merely stores information regarding individual animal and group characteristics in pasture, while at a feedlot,

and at a packing plant through carcass data correlated through the use of an ear tag attached at the feed lot. There is simply no teaching or suggestion in *Bi*, *Ordish*, *Gransbery*, *Pratt* and the alleged well-known art to combine them as done in the Office Action. The Examiner's rationale for combining *Bi* and *Ordish* is that commodities such as cattle were popular trading instruments and would have been simple to include in any matching or trading system. However, neither *Bi*, *Ordish* or the citations of record teach or suggest combining *Bi* and *Ordish* as done by the Examiner. Even assuming it were possible to combine *Bi* and *Ordish* as the Examiner has done, the mere possibility that it can be done is insufficient: the prior art must lead the person of ordinary skill in the art to make the combination. *Ex Parte Patrizia Milazzo et als.*, 2002 WL 1821709 (Bd.Pat. App. & Interf.)(citing *In re Fritch*, 972 F.2d 1260, 1266 n.14, 23 U.S.P.Q.2d 1780, 1783-84 n.14 (Fed. Cir. 1992), *In re Gordon*, 733 F.2d 900, 902, 221 U.S.P.Q.2d 1125, 1127 (Fed. Cir. 1984). 12783-4 n. Moreover, the Examiner cites *Gransbery* as disclosing that breeders of cattle are becoming more aware of consumer demands for the product and have started to breed cattle with this demand in mind. The Examiner concludes that it would have been obvious to include the teaching of *Gransbery* in the disclosures of *Bi* and *Ordish* so that producers can inform potential buyers of the cattle of the specific breeding practices in order to increase the appeal to the overall market. What the Examiner is referring to is the statement of one person interviewed for the *Gransbery* article who states: "Produce the cattle that is trending toward what the consumer and the packer is demanding." This ignores the other approaches suggested by other interviewees: "You'd better have good bulls" – "Quality speaks for itself" – "You have to have a product to sell" – "If it is for the commercial, it has to fit the environment and the management plans" – "If it is for the breeder, it must first be an outstanding animal. Plus there must be performance" – use a breed that "thrives in a down market" – use a "low-input-cost cow that is self-reliant." Thus, properly viewed as a whole, the person of ordinary skill in the art would not have been led to choose any particular approach to selling bulls in a depressed cattle market over the other choices based on the citations. There is no mention of a supply profile defined based on a "pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter" as recited in Claim 9 in either *Gransbery* or *Bi* or *Ordish*. There is nothing in *Gransbery* that even

hints at a technology implementation involving the claimed cattle information server, buyer interface and producer interface. Therefore, it is clear that the Examiner has engaged in hindsight reasoning in which the Applicant's disclosure is the only possible source of motivation for combining the cited art. There is thus no motivation in the prior art to combine any of *Bi*, *Ordish* or *Gransbery* as done in the Office action. The rejection should be reversed for this additional reason.

Furthermore, the Examiner alleges that it was well known at the time of the invention to utilize the services of a third party in order to verify aspects of a product or service, and that therefore it would be obvious to combine the *Bi*, *Ordish*, *Gransbery*, or *Pratt*. First, this is not what Claim 9 recites: Claim 9 recites "verifying, by a third party, the pre-conditioning program of the identified group of cattle" in which the "pre-conditioning program compris[es] any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter." Thus, that which the Examiner is asserting is well-known is not actually what is claimed. This alone is sufficient for reversal of the Examiner's rejection.

Secondly, if the Examiner is attempting to take Official Notice, then due process requires the Examiner specifically identify the assertion as such. Regardless, Official Notice is only appropriate where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known. M.P.E.P. §2144, 8th Ed., 4th Rev. That is not the case here, as proven by the fact that the Examiner was unable to produce a reference showing a step of "verifying, by a third party, the pre-conditioning program of the identified group of cattle" in which the "pre-conditioning program compris[es] any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter," nor is this step "capable of such instant and unquestionable demonstration as to defy dispute." *In re Ahlert*, 424 F.2d 1088,1091, 165 USPQ 418, 420 (CCPA 1970)(citing *in re Knapp Monarch Co.*, 296 F.2d 230, 132 USPQ 6 (CCPA 1961)). This is especially so in the claimed context and in combination with the other steps of Claim 9. Moreover, "[i]t is never appropriate to rely solely on "common knowledge" in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based." M.P.E.P. §2144, 8th Ed., 4th Rev. (citing *In re Zurko*, 258 F.3d 1379, 1385, 59 USPQ2d 1693,

1697 (Fed.Cir.2001)). An assessment of basic knowledge and common sense that is not based on any evidence in the record lacks substantial evidence support. *Id.* at 1385, 59 USPQ2d at 1697. See also *In re Lee*, 277 F.3d 1338, 1344-45, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002). Thus, the Examiner's assertion that the "verifying" step was well-known was defective *ab initio* and must be reversed for this additional reason. In short, to support a rejection in accordance with the requirements of due process and the Administrative Procedure Act ("APA"), the Examiner was required to make findings of fact supported by "substantial evidence." *In re Gartside*, 203 F.3d 1305, 1315, 53 USPQ2d 1769, 1775 (Fed.Cir.2000); MPEP §1216.01. In lieu of substantial evidence, the Examiner offers nothing but an out-of-context assertion that the "verifying" step of Claim 9 was well-known. The Examiner's rejection offends Due Process under the 5th Amendment to the U.S. Constitution and the embodiment of its principles in the APA, and must be reversed for all of the foregoing reasons.

**D. No Reasonable Expectation of Success in Making the Combination of *Bi*, *Ordish*,
Gransbery, *Pratt* and Alleged Well-Known Art**

One of ordinary skill in the art could have had no reasonable expectation of success in obtaining the invention of Claim 9 from the disclosures of *Bi*, *Ordish*, *Gransbery*, *Pratt* and the alleged well-known art. First, *Bi* is directed to a computer matching system for products in which offers are limited to a description of product, market position (buyer, seller, both), date of offer, date of delivery, offerer, price and volume. *Ordish* discloses a matching system for foreign exchange, stocks, bonds, and commodities future contracts, which broadcasts offers with price and quantity terms to a number of users who may than respond to that offer. It is clear that both *Bi* and *Ordish* are directed to general commodities trading in which there is no background information provided about the product sold, let alone, for example, a step of "receiving information defining a supply profile at the cattle information server from the interface, wherein the supply profile specifies a pre-conditioning program of an identified group of cattle, the pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter." Thus, one of ordinary skill in the art could have had no reasonable expectation of success in combining *Bi* and *Ordish* as done in the Office Action in an effort to obtain the invention of Claim 9. Moreover, *Gransbery* is an

article from a number of interviewees who all offer the various opinions on how to sell bulls in a down market. *Gransbery* contains no mention of any technology implementation such as interfaces or a cattle information server. Therefore, a person of ordinary skill in the art would have been at a loss to associate the *Gransbery* article with *Bi* or *Ordish* in any way. Thus, one of ordinary skill would have had no reasonable expectation of success in combining *Bi*, *Ordish* and *Gransbery* as done in the Office Action. *Pratt* does not mention any network: instead, its various sensor interfaces are connected directly to its feedlot computer (see, e.g., Fig. 5 of *Pratt*). Therefore, the person of ordinary skill in the art would have been at a loss to comprehend how *Pratt* would tie in with *Bi*, *Ordish* or *Gransbery* and could have had no reasonable expectation of success in combining these citations. Finally, the Examiner's allegation that it was well-known "to utilize the services of a third party in order to verify aspects of a product or service" is wildly out of context to what is actually claimed in Claim 9. It would never have occurred to the person of ordinary skill that "verifying, by a third party, the pre-conditioning program of the identified group of cattle" wherein the "pre-conditioning program comprises any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter," as recited in Claim 9. Thus, the person of ordinary skill in the art could have had no expectation of success in combining of *Bi*, *Ordish*, *Gransbery*, *Pratt* and the alleged well-known art to obtain Claim 9. Thus, the Examiner's rejection should be reversed for this additional reason.

E. No Determination of the Level of Ordinary Skill in the Art has been made in the Rejection

As noted above, the U.S. Supreme Court has found that examiner must resolve the level of ordinary skill in the art in making a determination of obviousness. *Graham v. John Deere, Inc.*, 383 U.S. 1, 17-18, 86 S.Ct. 684, 15 L.Ed.2d 545, 148 USPQ 459, 465 (1966). As with the rejection of Claims 1-8, the Examiner has also failed to determine the level of ordinary skill in the art in making the obviousness rejection with respect to Claims 9-11. Therefore, reversal of the rejection is requested for this additional reason.

F. *Bi, Ordish, Gransbery, Pratt* and the Alleged Well-Known Art Fail to Disclose All of the Limitations of Claims 9-11

Even if *Bi, Ordish, Gransbery* and *Pratt* are combined as done in the Office Action, all of the limitations are still not met by the combination. Claim 9 has been amended to clarify the claimed invention, and is presented below for convenience:

9. (currently amended) In a beef cattle marketplace comprising a cattle information server and at least one interface, each of which is communicatively connected to a network, a method for tracking cattle production comprising:

receiving information defining a supply profile at the cattle information server from the interface, wherein the supply profile specifies a pre-conditioning program of an identified group of cattle, the pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter;

verifying, by a third party, the pre-conditioning program of the identified group of cattle;

storing the supply profile of the identified group of cattle in a database associated with the cattle information server;

receiving information defining carcass characteristics of the identified group of cattle at the time of harvest from the interface;

storing the carcass characteristics of the identified group of cattle in a database associated with the cattle information server; and

correlating the carcass characteristics of the identified group of cattle with the supply profile.

Applicant respectfully submits that the combination of *Bi, Ordish, Granbery* and *Pratt*, do not teach all of the claim limitations of Claim 9. For example, these references, alone and when combined, do not teach a method comprising: “receiving information defining a supply profile specifying a pre-conditioning program of an identified group of cattle, the pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of a cattle prior to slaughter, and verifying by a third party the pre-conditioning program of the identified group of cattle.” On Page 7 of the Office Action, the Examiner admits *Bi* does not disclose the verifying, receiving, storing and correlating steps, and attempts to rely on *Pratt* as disclosing these steps of Claim 9. However, it is very clear that *Pratt* does not disclose “verifying by a third party the pre-conditioning program of the identified group

of cattle.” Although the Examiner attempts to state that it was well-known to utilize the services of a third party in order to verify aspects of a product or service, this is not what is claimed in Claim 9. To the extent the Examiner is attempting to state that the “verifying” step of Claim 9 was well-known, that allegation is not capable of instant and unquestionable demonstration as being true, as illustrated by the fact that the Examiner has not produced any prior art to prove it. Furthermore, the Examiner has produced no evidence, let alone substantial evidence, that the “verifying” step of Claim 9 was well-known. This is contrary to the most basic tenets of Due Process of law and is specifically proscribed by the APA. *In re Gartside*, 203 F.3d 1305, 1315, 53 USPQ2d 1769, 1775 (Fed.Cir.2000); MPEP §1216.01; *In re Zurko*, 258 F.3d 1379, 1385, 59 USPQ2d 1693, 1697 (Fed.Cir.2001). For all of these reasons, reversal of the rejection of Claim 9 is requested.

Claims 10-11 depend from Claim 9, and thus include all limitations of Claim 9. Thus, Claims 10-11 distinguish over the prior art for the reasons previously stated with respect to Claim 9. Additionally, the citations, when combined, do not teach the feature of Claim 11, for example, of “mining the database to determine patterns between the pre-conditioning program and at least one carcass characteristic.” One of ordinary skill in the art would appreciate that mining a database to determine a pattern includes discovering previously unknown relationships among the data. (http://www.webopedia.com/TERM/d/data_mining.html). Although *Pratt* provides for the “accumulation, recording and correlation of historical data, feedlot performance data, and carcass data” (Pratt, Col. 5, lines 46-49), it does not provide nor suggest modifying the present invention to mine a database to determine patterns between a pre-conditioning program and at least one carcass characteristic, but rather provides specific correlations which would be determined by the method of *Pratt*. (See *Pratt*, lines 55-62, providing correlating characteristics to determine “improved slaughter date and production costs projections”, “improved efficiency and value”, etc). Thus, *Pratt* does not provide a method for mining a database to determine additional patterns that might exist between a pre-conditioning program and at least one carcass characteristic.

For all of the foregoing reasons, reversal of the rejections of Claims 1-11 under 35 U.S.C. 112, Second Paragraph and 35 U.S.C. 103(a), is requested.

8. *Claims Appendix.*

1. (currently amended) In a beef cattle marketplace comprising a buyer interface, a producer interface, and a cattle information server, each of which is communicatively connected to a network, a method for marketing cattle comprising:

receiving information defining a plurality of demand profiles at the cattle information server from the buyer interface, wherein at least one of the demand profiles specifies a first pre-conditioning program for a group of cattle, a pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter;

receiving information defining a supply profile for a group of cattle at the cattle information server from the producer interface, wherein the supply profile specifies a second pre-conditioning program for the group of cattle;

comparing the supply profile to the plurality of demand profiles to determine whether a match exists between the supply profile and one of the demand profiles, based at least in part on a comparison of the first and second pre-conditioning programs; and

providing an indication to one of the buyer interface and the producer interface of at least one matching demand profile in response to a match.

2. (original) The method of claim 1, further comprising generating a bid associated with at least one of the plurality of demand profiles.

3. (original) The method of claim 2, wherein generating a bid associated with at least one of the plurality of demand profiles comprises generating a bid price based at least in part on a non-fixed public index price.

4. (original) The method of claim 2, further comprising receiving an acceptance of a bid from the producer interface.

5. (currently amended) A system for dynamically marketing cattle comprising:

- a buyer interface;
- a producer interface;
- a network; and

a cattle information server wherein the cattle information server is communicatively connected to the buyer interface and the producer interface through the network;

wherein the cattle information server: receives information from the buyer interface defining a plurality of demand profiles, wherein at least one of the demand profiles contains information specifying a first pre-conditioning program, the first pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter; receives information from the producer interface defining a supply profile, wherein the supply profile specifies a second pre-conditioning program, the second pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter; stores the demand profiles and supply profile in a database; and searches the database to determine if one or more of the demand profiles match the supply profile based at least in part on a comparison of the first and second pre-conditioning programs; and identifies to one of the buyer interface and producer interface at least one demand profile in response to a match between the supply profile and the demand profile.

6. (original) The system of claim 5, wherein the cattle information server further generates a bid associated with at least one of the plurality of demand profiles.

7. (original) The system of claim 6, wherein the bid generated by the cattle information server includes a bid price based at least in part on a non-fixed public index price.

8. (original) The system of claim 6, wherein the cattle information server further accepts a bid using the producer interface.

9. (currently amended) In a beef cattle marketplace comprising a cattle information server and at least one interface, each of which is communicatively connected to a network, a method for tracking cattle production comprising:

receiving information defining a supply profile at the cattle information server from the interface, wherein the supply profile specifies a pre-conditioning program of an identified group of cattle, the pre-conditioning program comprising any of numerous protocols or criteria that govern the breeding, feeding, management, and health of cattle prior to slaughter;

verifying, by a third party, the pre-conditioning program of the identified group of cattle;

storing the supply profile of the identified group of cattle in a database associated with the cattle information server;

receiving information defining carcass characteristics of the identified group of cattle at the time of harvest from the interface;

storing the carcass characteristics of the identified group of cattle in a database associated with the cattle information server; and

correlating the carcass characteristics of the identified group of cattle with the supply profile.

10. (original) The method of Claim 9, further comprising identifying one of a geographic location and ownership identification of at least one animal selected from the identified group of animals.

11. (original) The method of Claim 9, further comprising storing a plurality of supply profiles and correlated carcass characteristics in a database and mining the database to determine patterns between the pre-conditioning program and at least one carcass characteristic.

9. *Evidence Appendix*

Not applicable.

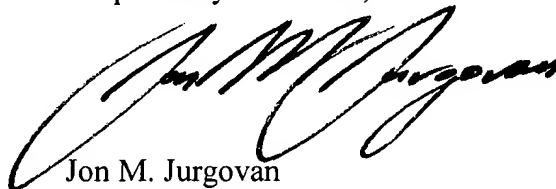
10. *Related Proceedings Appendix*

Not applicable.

CONCLUSION

In conclusion, Claims 1-11 meet the requirements of 35 U.S.C. § 112, Second Paragraph. In the alternative, Applicant requests the BPAI to approve one of the proposed options to amend Claims 1-11 to meet the requirements of 35 U.S.C. 112. Because the Examiner has not met the burden of establishing the *prima facie* case of obviousness under 35 U.S.C. § 103(a), Applicant respectfully requests reversal of the rejections of Claims 1-11 with instructions for a Notice of Allowance to be issued promptly for all pending Claims.

Respectfully submitted,

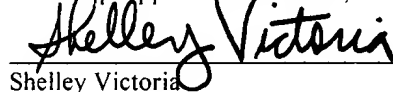


Jon M. Jurgovan
Registration No. 34,633

CUSTOMER NO. 00826
ALSTON & BIRD LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Tel Atlanta Office (404) 881-7000
Fax Atlanta Office (404) 881-7777

"Express Mail" mailing label number EV 813816602 US
Date of Deposit November 14, 2006

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to:
Mail Stop Appeal Brief-Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450


Shelley Victoria